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April 4, 2005

The Honorable Robert L. Ehrlich, Jr.
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

Re: Senate Bill 401 / House Bill 514

Dear Governor Ehrlich:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 401 and House Bill 514, identical bills that concern the State's participation in international trade agreements between the federal government and foreign parties.

Section 1 of the bills would add a new §3-308 to the State Government Article ("SG"). Under that provision, the Governor and other state officials would be barred from either directly binding the State to an international trade agreement or consenting to a federal action to bind the State to such an agreement unless the General Assembly passed a law specifically authorizing the State's participation in the agreement.¹ Section 2 of the bills states that any consent given by the Governor or other State officials to be bound by government procurement rules in an international trade agreement prior to the effective date of the bills is "declared invalid" and that the State is not bound by any such agreements. Section 3 of the bill directs that a copy of the bill be forwarded to the Governor, the legislative leadership, and the State's congressional delegation.

¹The provision only applies to international trade agreements between the federal government and foreign countries in which the federal government invites the State to participate. It does not apply to a trade agreement between the State and a foreign country that does not involve the federal government.

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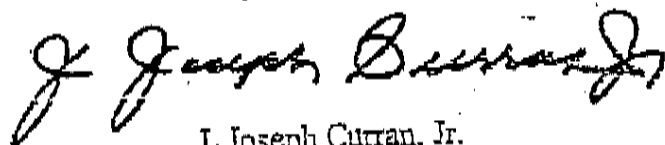
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The State's participation in international trade agreements at the behest of the federal government was the subject of a recent advice letter of this Office. See Letter to Honorable John Adams Hurson from Robert N. McDonald, Chief Counsel, Opinions and Advice (February 15, 2005) (copy attached). As noted in that letter, State law has not previously addressed the process under which the State decides whether to participate in such agreements. In the absence of such a statute, the Governor has authority to make commitments concerning Executive Branch procurement to the extent those commitments are consistent with State law. SG §3-308 would now govern the process for the State's participation in such agreements in that it explicitly restricts the Governor's authority in the absence of a law that specifically authorizes the State's participation in a particular trade agreement. We find no constitutional objection to this provision.

It might be argued that Section 2 of the bills, which declares invalid any past consent given by the Governor or other officials to international trade agreements setting rules for State procurement, exceeds the Legislature's constitutional power to the extent that it purports to declare the legal effect of past actions of an executive branch official. Such decisions are more appropriately the province of the judicial branch. Cf. *Barrett v. Oliver*, 7 G & J 191 (1835) (legislative enactment that purported to invalidate deeds violated Article 8 of the Declaration of Rights by invading the province of the judiciary). However, an interpretation which raises doubts about an enactment's constitutionality should be avoided if the language of the act permits. *Schochet v. State*, 320 Md. 714, 725-26, 580 A.2d 176 (1990). In our view, this provision should be construed not to invalidate the State's past participation in an agreement based on the assent of an executive official, but to condition the State's continued participation in an agreement on the enactment of appropriate legislation.

We also recommend that a copy of the legislation be provided to the United States Trade Representative, which represents the United States in connection with international trade agreements and which has been directed by Congress to consult with the States in carrying out those functions.

Very truly yours,



J. Joseph Curran, Jr.
Attorney General